1-27-1976

Strunk Construction Company, Inc. v. James Lee Stewart and J.D. Mullican, Inc.

Appellee's Brief 1975-SC-1023

Repository Citation

1975-SC-1023, Appellee's Brief, "Strunk Construction Company, Inc. v. James Lee Stewart and J.D. Mullican, Inc." (1976). *1970-1979*. 235.
https://uknowledge.uky.edu/ky_appeals_briefs70s/235

APPELLEE'S BRIEF

SUPREME COURT OF KENTUCKY

Formerly Court of Appeals of Kentucky

File No. 75-1023

STRUNK CONSTRUCTION COMPANY,
INC., ... APPELLANTS.

VS:

JAMES LEE STEWART and
J. D. MULLICAN, INC., . . APPELLEES.

APPEAL FROM PULASKI CIRCUIT COURT
HON. LAWRENCE S. HAIL, JUDGE

BRIEF FOR APPELLEE JAMES LEE STEWART

FILED
JAN 27 1976
MARTHA LAYNE COLLINS
CLERK
SUPREME COURT

JOHN G. PRATHER, JR.
JOHN G. PRATHER
P. O. Box 106
Somerset, Kentucky 42501

Attorneys for Appellee
James Lee Stewart

This is to certify that the within brief has been served upon the Appellant and Hon. Thomas E. Utley, Attorney for Appellant, at P. O. Drawer 30, Somerset, Kentucky 42501, and the Appellee J. D. Mullican, Inc. and Hon. Charles C. Adams, P. O. Box 55, Somerset, Kentucky 42501, Attorney for Appellee J. D. Mullican, Inc., and Hon. [illegible] K. Walker, succeeding Hon. Lawrence S. Hail, the Trial Judge at Somerset, Kentucky, pursuant to RCA 1.270, this the [illegible] day of January, 1976.

Attorney for Appellee [illegible]

[illegible]

TABLE OF CONTENTS AND AUTHORITIES

TABLE OF CONTENTS AND AUTHORITIES (Continued)

TABLE OF CONTENTS AND AUTHORITIES (Continued)

STATEMENT OF QUESTIONS PRESENTED

1. Was the Appellant entitled to a Directed Verdict as against:

(a) The claims of the Appellee, James Lee Stewart?

(i) What elements are necessary to establish the tort of interference with a contract or business relationship?

(ii) Were sufficient facts presented during the trial to establish the elements of interference with contract or business?

(iii) Was evidence presented that the money withheld from Stewart was wrongfully obtained?

(b) The Claim of the Appellee, J. D. Mullican, Inc.? (Not discussed herein — represented by separate counsel)

2. Was it error for the Court below to instruct the jury allowing recovery by the Appellee, James Lee Stewart of punitive damages?

3. Do the punitive damages rendered by the Jury verdict appear to be excessive and granted under the influence of passion or prejudice?

SUPREME COURT OF KENTUCKY

Formerly Court of Appeals of Kentucky

File No. 75-1023

STRUNK CONSTRUCTION COMPANY,
INC., ... APPELLANTS,

VS:

JAMES LEE STEWART and
J. D. MULLICAN, INC., ... APPELLEES.

APPEAL FROM PULASKI CIRCUIT COURT
HON. LAWRENCE S. HAIL, JUDGE

BRIEF FOR APPELLEE
JAMES LEE STEWART

MAY IT PLEASE THE COURT:

STATEMENT OF THE CASE

(a) Statement of Proceedings

The Appellee adopts the "Statement of Proceedings" as set forth in Appellant's Brief and will refer to the parties as "Stewart" for the Appellee, James Lee Stewart; as "Mullican" for the Appellee, J. D. Mullican, Inc.,; as "Strunk" for the

Appellant Strunk Construction Company, Inc.; and as "Hinkle" for Hinkle Contracting Corporation, a defendant in the Court below. The transcript of the proceedings and evidence as prepared by the Official Reporters of the Pulaski Circuit Court will be referred to by the abbreviation "Tr.". The record of the Pulaski Circuit Court as prepared by the Circuit Court Clerk will be referred to by the abbreviation "R".

(b) Statement of the Facts

The Appellee, James Lee Stewart, disagrees in part with the "Statement of Facts" contained in the Brief for the Appellant, and offers the following corrected statement of the facts as established by the stipulations of the parties and the evidence as presented.

Stewart was the owner and operator of a certain trucking operation known as J & J Trucking Company engaging in primarily in the hauling of dirt and rock (Tr. p. 32); and in 1970 as a part of that business secured a contract, under a purchase order, for the hauling of all of the stone to a construction site in Ferguson, Kentucky (Tr. p. 33, Q. 20; p. 98, Q. 20; p. 108, Q. 19) at the rate of fifty cents per ton (Tr. p. 33, Q. 22; p. 108, Q. 17). Stone was hauled from Somerset Stone Company for four days (Tr. p. 34, Q. 26) until that supply was depleted (Tr. p. 35, Q. 34). On the fourth day

Stewart began hauling stone from Strunk to the construction site and continued so doing for three days ending 5 November, 1970, (Tr. p. 34, Q. 42; p. 76, Q. 12; p. 126, Q. 10) at which time Strunk intentionally (Tr. p. 50, Q. 183) refused to load Stewart's trucks (Tr. p. 76, Q. 14; p. 83, Q. 11). The only reasons given for the refusal were (a) orders from Mr. Yocum, an officer of both defendants, (Tr. p. 36, Q. 47) and (b) that the truckers who sat around at the quarry were supposed to haul (Tr. p. 27, Q. 58). At that time Strunk knew and was aware of the contractual or business relationship between Stewart and Mullican (Tr. p. 36, Q. 50; p. 40, Q. 94; p. 66, Q. 95; p. 67, Q. 97; p. 80, Q. 61) Although still ready, willing and able to haul, (Tr. p. 38, Q. 67; p. 40, Q. 86-87) Stewart informed Mullican that he couldn't deliver because Strunk would no longer load his trucks (Tr. p. 68, Q. 5). Strunk then continued to furnish the stone for the construction site (Tr. p. 111, Q. 48; p. 127, Q. 16) at a price including a charge of sixty cents per ton for hauling (Tr. p. 110, Q. 35). Stewart hauled no more stone to the site.

Stewart had not been refused loading by Strunk prior to 6 November, 1975, (Tr. p. 49, Q. 173) nor had his truckers been refused (Tr. p. 49, Q. 174) and no other truck was refuesed for a period of three years and three months (Tr. p. 130, Q. 2 Re-cross; Q. 1, Re-direct) and no other incident of this type occurred in that period of time (Tr. p. 131, Q. 2). Mullican had not been refused the sale of stone.

A meeting of the minds occurred or a contractual relationship had been entered into between Strunk (through Mr. Yocum) and Mullican to sell stone at a firm price (Tr. p. 87, Q. 45-49, Q. 51-52) during negotiations which occurred before the hauling started (Tr. p. 114, Q. 16), and during those negotiations Mullican was quoted Strunk's price *at the quarry* (Tr. p. 108, Q. 15) without restrictions on bidding or hauling (Tr. p. 108, Q. 16).

Mr. Yocum, of Strunk, later claimed that it was against company policy to sell such an order other than *delivered* to the job site. (Tr. p. 206, Q. 14). Yet, no such policy was written (Tr. p. 214, Q. 15), nor was a copy available through Strunk's Superintendent Appleby (Tr. p. 197, Q. 49-59); nor was Stewart informed of the policy/reason for not loading him (Tr. p. 48, Q. 159); nor was Mr. Mullican informed of the "policy" as a reason for not loading Stewart (Tr. p. 109, Q. 31); nor was Mr. Tucker (of Mullican) told of such policy when bids were sought prior to the stopping of Stewart (Tr. p. 115, Q. 27); nor was any reason for refusing to load stone given to Stewart's drivers who testified (Tr. p. 119, Q. 23; p. 122, Q. 11). No other reasons for refusing to load Stewart were communicated to anyone until enumerated by Mr. Yocum at trial. (Tr. p. 86, Q. 30; p. 208, Q. 20; p. 209, Q. 28, 29). In the record there is no proof relating to any inability to maintain order and control at the quarry, shortages of stone, shortages of equipment for loading stone, or conflicting orders for production (these being the other reasons Yocum enumerated). Rather, it was stipulated that all stone hauled for the project was hauled by Stewart or by drivers used by Strunk Construction Company, and no one else (Tr. p. 12, Third Gram.¶).

The truckers who waited at the quarry were aware of Stewart's contract or business relationship with Mullican (Tr. p. 41, Q. 97-103) and were aware of where Stewart's trucks were hauling (Tr. p. 119, Q. 29). Both the truckers at Strunk (Tr. p. 86, Q. 33; p. 80, Q. 58) and Strunk (Tr. p. 80, Q. 56) received a benefit from the refusal to load Stewart. Strunk wanted to control truckers on large contracts (Tr. p. 83, Q. 14) to the point of dictating haul fees (Tr. p. 81, Q. 74), but had not previously refused such loading (Tr. p. 130, Q. 2 Re-cross; Q. 1 Re-direct).

Stewart initially testified on direct examination that, as a direct result of the acts complained of, he lost anticipated profits of $10,202.27 (Tr. p. 46, Q. 145) as a direct and proximate result of the acts of Strunk. This figure was determined by including gasoline expenses (Tr. p. 43, Q. 122); wages paid to drivers (Tr. p. 43, Q. 116); storage (Tr. p. 43, Q. 122); wages paid to drivers (Tr. p. 43, Q. 116); storage (Tr. p. 44, Q. 126); wages and salaries paid to persons not actually on the job. (Tr. p. 44, Q.

125); withholding taxes (Tr. p. 62, Q. 52); and unemployment and payroll taxes (Tr. p. 62, Q. 54). Mr. Stewart, with the Court's permission (Tr. p. 70), later revised his computations and in addition deducted from the above included profit figure costs of insurance premiums (Tr. p. 177, Q. 9), vehicle maintenance (Tr. p. 177, Q. 17), oil (Tr. p. 178, Q. 24), tires (Tr. p. 178, Q. 27), vehicle licenses (Tr. p. 176, Q. 13), and depreciation (Tr. p. 179, Q. 35); and arrived at a loss of anticipated profits of $9,094.77 (Tr. p. 180, Q. 42) which figure was somewhat low (Tr. p. 180, Q. 43). Strunk's witness, (Spenser) who was working for the parent corporation Hinkle, in the trucking business, at the time of the trial (Tr. p. 234, Q. 27), was of the opinion that Stewart could have earned between $4,250.94 and $4,554.57 stating that he (Spenser) couldn't operate in the same manner as Stewart (Tr. p. 235, Q. 47).

Stewart also testified that the sum of $909.85 (Tr. p. 53, Q. 208) was withheld from monies due him from Somerset Stone Company (Tr. p. 52, Q. 201) and that those monies were withheld for Strunk Construction Company (Tr. p. 53, Q. 209) without his permission (Tr. p. 53, Q. 210). The General Manager of Somerset Stone Company was told by somebody in Strunk that Stewart owed Strunk money and requested that it be deducted from funds owed to Stewart by Somerset Stone Company if agreeable (Tr. p. 92, Q. 20). He also told Stewart that Hinkle (Strunk's parent corporation) had withheld money from Somerset Stone Company because Stewart owed money to Strunk (Tr. p. 53, Q. 214; p. 54, Q. 215). The manager of Somerset Stone knew that Stewart didn't like having the funds withheld (Tr. p. 94, Q. 4) but Stewart did accept the remaining funds from Somerset Stone (Tr. p. 93, Q. 34). Eight days later Somerset Stone paid Strunk (Tr. p. 93, Q. 39). Stewart admitted that he owed Strunk the money (Tr. p. 67, Q. 99) but objected to the taking of his money without a lawsuit (Tr. p. 54, Q. 218), a garnishment (Tr. p. 54, Q. 219), a lien being filed (Tr. p. 54, Q. 220), or some other legal process. This event occurred in July, 1971, after the November of 1970, when the truck loading controversy occurred and Stewart considered Strunk to be indebted to him, in a far greater sum, by virtue of the acts of Strunk and Hinkle that precipitated this lawsuit.

Appellant's recital of the instructions given is correct.

ARGUMENT

I. THE APPELLANT WAS NOT ENTITLED TO A DIRECTED VERDICT AS AGAINST:
(a) THE CLAIMS OF THE APPELLEE, JAMES LEE STEWART?

The Appellant, Strunk Construction Company alleges that it was entitled to a Directed Verdict against James Lee Stewart thereby implying that after drawing all fair and rational inferences from the evidence, favorable to Stewart, that the evidence was insufficient to sustain the verdict (*Combs* v. *Peoples Bank*, Ky., 313 Ky. 120, 230 S.W. 2d 475 at 477) or that Stewart's evidence amounted only to a scintilla (*Thompson* v. *Shutz*, Ky., 309 Ky. 253, 217 S.W. 2d 315 at 318). This implication of insufficient evidence requires a response by analyzing the issues there contained.

(i) What elements are necessary to establish the tort of interference with contract?

The tort of interference with contract or interference with one's right to labor has been recognized by this Commonwealth for at least sixty-five years since the Court stated in *Chambers* v. *Probst*, Ky., 145 Ky. 381, 140 S.W. 572 at 574 that:

> "Courts of last resort generally agree that it is an actionable wrong to interfere with one's right to labor without justification."

And, the action for interference with contract has continued to be recognized at least through 1975 when the United States Sixth Circuit Court of Appeals in *David H. Elliot Co. Inc.*, v. *Caribbean Utilities Co., Ltd.*, 513 F2d 1176 at 1182 said:

> "In Kentucky, intentional interference with a known contractual relationship gives rise to an action, in tort, if the interference is malicious or without justification, (citing *Derby Road Building Co.* v. *Commonwealth*, Ky., 317 S.W. 2d 891, 895)"

In fact, mere interference with a plaintiff's business has been recognized as a tort in Kentucky in such cases as *United Construction* v. *New Burnside Veneer*, Ky., 274 S.W. 2d 787 (1955); *M. W. Ritchie* v. *United Mine Workers of America*, 410 F2d 827 (6th Cir. 1969); and *Riverside Coal Company* v. *United Mine Workers of America*, 410 F2d 267 (6th Cir. 1969). Even the Appellant admits the doctrine (see Appellant's Brief, page 10). Then, what are the elements?

45 AmJur 2d § 39 Page 314 "Interference" recited that the "elements essential to recovery for tortious interference with a contract [or business relationship] are (1) the contract [or business relationship]; (2) the wrongdoer's knowledge thereof; (3) his intentional procurement of its breach; (4) the absence of justification; and (5) damages resulting therefrom." In discussing the liability of a stranger to a contractual relationship the Court in *Derby Road Building Co., Inc.,* v. *Commonwealth of Kentucky, Department of Highways,* Ky., 317 S.W. 2d 891 (1958) at 895 stated that:

> "Such liability is predicated upon an intentional interference, malicious or without justification with known contractual rights possessed by the party suing to recover damages therefor."

This then has established that proof must have been introduced from which it could be inferred that (a) Strunk knew of the contract or business relationship between Mullican and Stewart; (b) that Strunk acted intentionally; and (c) that Strunk's acts were done either maliciously or without justification.

(ii) Were sufficient facts presented during the case to establish the elements of interference with contract or business?

Strunk's knowledge of Stewart's contract or business relationship was established through the testimony of Stewart and the testimony of Appleby (Superintendent at Strunk), and from the words of Mr. Horne who spoke to Stewart, and by implication from conversations between Appleby and

Yocum (president of Strunk and vice-president of Hinkle). Stewart testified that he told Appleby (of Strunk) of his contract with Mullican at the time of the refusal to load his trucks (Tr. p. 36, Q. 50; p. 66, Q. 95); that Mr. Horne of Hinkle was aware of the contract (Tr. p. 40, Q. 94); that Appleby had knowledge before the date of the refusal (Tr. p. 67, Q. 98) and Appleby had actually asked Stewart when Strunk's drivers could help Stewart haul (Tr. p. 67, Q. 97). Appleby admitted that he was aware that Stewart was hauling for Mullican prior to refusing to load Stewart's trucks (Tr. p. 80, Q. 61) and admitted that he knew of Stewart's claim to have a business relationship under a purchase order (Tr. p. 196, Q. 38). Mr. Spitzke (who was an employee of Mullican) testified of Appleby's presence in Mullican's office "a number of times" (Tr. p. 98, Q. 20) before the contract or purchase order was signed. It logically follows that since Appleby knew that Strunk did not get the contract, that someone else (Stewart) must have gotten it. Strunk through its loading facility knew Stewart had been hauling to Mullican for three days. By the time Appleby called Yocum for instructions, and prior to the refusing to load Stewart, he had ascertained that Stewart was the hauler. Knowledge was everywhere.

Appellant argues, at page 14 of his Brief, that Frank Yocum, President of Strunk, had no knowledge of where the trucks were hauling.

Strunk's Superintendent Appleby did know, and it is basic that the knowledge of the Superintendent would be imputed to the Corporation for which he worked. Otherwise, one corporate official could always be shielded from information coming into the corporation, and the corporation could always plead ignorance. Perhaps Yocum didn't want to know.

There is no question that Strunk intentionally refused to load Stewart's trucks according to Stewart (Tr. p. 50, Q. 183), according to Appleby (Tr. p. 76, Q. 14), and according to Yocum (Tr. p. 83, Q. 11). After all, it would be difficult to claim "accidentally" or "unknowingly" refusing to load stone into a dump truck. And, it was testified by Yocum that the Company (Strunk) wanted to control the hauling (Tr. p. 83, Q. 14) which it intended to do by boycotting Stewart. Intent may be inferred from the acts of the tortfeasor taking into account the knowledge held. *Prosser* says at Page 965, "Once such knowledge is established, there is of course no difficulty in finding liability where the defendant has acted with the desire and purpose of interfering with the contract or of appropriating its benefits to himself." *Prosser On Torts* (3rd Ed 1964). And, Strunk admitted that it was an advantage "business-wise" (Tr. p. 80. Q. 56) to Strunk to keep the Strunk truckers available and that it was a benefit to the truckers to get the Stewart job (Tr. p. 86, Q. 33-34) logically imputing a benefit "business-wise" to Strunk. Knowing that Stewart and Mullican had a contract, Strunk intentionally took it over — and at a higher price. Actual knowledge is always difficult to prove. As stated in *Ashton* v. *Commonwealth of Kentucky*, Ky., 405, S.W. 2d 562 at 569 (1965),

> ". . . it is a practical impossibility to prove his [the defendant's] knowledge, . . . or his intent, or his purpose (all of which are subjective) except as a permissible inference which may reasonably be drawn from his particular conduct." (Parenthesis *not* added.)

The last requirement gleaned from *Derby, supra,* was the requirement that the acts were done maliciously *or* without justification. Stewart introduced proof that the acts were done both maliciously *and* without justification and allowed the jury to determine one or both. *Prosser* at page 951 discusses "malicious" taking its definition

> "through an intent to profit at the expense of the plaintiff, to a mere intent, with knowledge of his interests, to do an act which will have the effect of interfering with them." *Prosser On Torts* (3rd Ed 1964)

In Kentucky, *Ashton, supra,* (at page 568) has defined "malice" as "without justifiable cause." Later, the word "malicious" was defined by the Court as the

> "doing of a wrongful act by one person against another intentionally *or* with evil intent without just cause or excuse *or* as the result of ill will." *Jillson* v. *Commonwealth*, Ky., 461 S.W. 2d 542, 544 (1970) (Emphasis added)

Interfering with a known contractual relationship is wrongful, and in the Court in *Jillson, supra,* (at 544) left the determination of "evil purpose" to the jury. *9 ALR 2d 240* analyzed "malice", "ill will", and "wrongful motive" in the context of rendering interference with contract and offers the following pertinent excerpts:

> ". . . no person has the right to injure or destroy the business or trade of another by acts which serve no legitimate purpose." Page 240
>
> ". . . 'malice' in its technical sense does not imply any culpable intent, but is the intentional doing of a harmful act without justification or excuse." Page 241
>
> "to do intentionally that which is calculated in the ordinary course of events to damage, and which, in fact, does damage another person in his property or trade is *malicious in law* . . ." Page 242-243 citing *Dade Enterprises* v. *Wometco Theatres* (1935) 119 Fla 70, 160 So 209. (Emphasis added.)
>
> ". . . 'malicious' . . . did not import personal ill will, but that if the interference be with the design of injuring the plaintiff or gaining some

> advantage at its expense, it is maliciously done." Page 242 citing *Lewis* v. *Bloede* (CA4th) Md 202 F7.
>
> "malice means . . . otherwise stated, the willful violation of a known right." Page 244

In the instant case there was a wrongful act against another person done intentionally (when Strunk intentionally refused to load the truck while knowing of the contractual relationship) with no just cause offered, (or given); no excuse; and no legitimate purpose; attempting only to serve Strunk's own advantage, which it did, to the damage of Stewart's business, to his trade, and at his considerable expense. The proof of the "wrongful act" did not require the introduction of violence. The coercive and obstructive act of refusal was sufficient. "Intimidation or coercion is as wrongful as the use of force and violence." *United Construction Workers* v. *New Burnside Veneer Co.*, Ky., 274 S.W. 2d 787, 789 (1955).

The existence of justification is a defense which the defendant Strunk (and Hinkle) failed to prove; and the absence thereof was proven by the plaintiff. The case of *Bell* v. *Aetna Oil Service, Inc.*, Ky., 242 Ky. 471, 46 S.W. 2d 757, 759, which the defendant's Brief properly quoted, said that,

> "Whether a man be a trader or not, he is not justified in damaging another's business or

> profession by fraudulent methods, by threats, interference with contract, libel, or slander of goods, obstruction, or unfair methods of any sort."

This was exactly Stewart's contention, that Strunk was not justified in damaging his business by interfering with his contract or by obstructing its performance by discriminatorily refusing to load his trucks. Certainly Strunk should not attempt to hide behind its own bad acts, and interference with contract and obstruction are bad acts.

Was the fact that Strunk's haulers were competing with Stewart a justification? For the answer we refer to *26 ALR2d* 1263-1267 which states at Page 1267:

> "The existence of an exclusive contract was held in itself to preclude justification predicated on alleged competition, in *Black* v. *Marcus Loew Booking Agency* (1942) 65 App Div 930, 38 NYS2d 427."
>
> "In *Eddyside Co.* v. *Seibel* (1940) 142 Pa Super 174, 15 A2d 691, the Court approves the rule that when one has knowledge of the contract rights of another his wrongful inducement of a breach thereof is a willful destruction of the property of another and cannot be justified on the theory that it enhances and advances the business interests of the wrongdoer."

These same principles were reinforced in *Later Case Service ALR2d Vol. 25-31,* "ALR2d 1227-1285" at page 260 which, in essence, said competition alone is *not justification.*

Strunk claims that it had reasons, or justification, for refusing to load the trucks suggesting an elusive "company policy" (Tr. p. 210, Q. 32), yet only Mr. Yocum presented proof of the policy. It is notable that such a policy, if one in fact did exist, was not written down, (Tr. p. 214, Q. 15), was not communicated to Stewart (Tr. p. 109, Q. 31), or Mullican (Tr. p. 109, Q. 31) or the man seeking bids from Strunk (Tr. p. 115, Q. 27) or even to Stewart's drivers. The credibility of Yocum was a question for the jury and, in the face of the complete failure to provide any additional proof of the actual existence of such a policy the jury would have been justified in allowing little if any credence to the claims of Yocum that such a policy did exist, especially in light of the facts as presented. Strunk's remaining reasons, or justification, for its refusal to load, such as to maintain order at the plant (which wasn't really a problem with Stewart anyway, according to Mr. Yocum, Tr. p. 87, Q. 38); for economic reasons, such as availability of equipment at the quarry; and other demands on Strunk's stone were actually ludicrous in light of Strunk's assumption of Stewart's contract and Strunk's actual completion of the job with Mullican. These reasons appear to be the claimed justification for the "company policy". But, it appeared that the jury didn't feel that the "policy" was adequate justification for the interference or that the "policy" just did not exist.

In fact, Strunk had the burden of proving justification if it were to be used by it as a defense.

> "A Prima Facie case is established by proving a breach of contract to have been procured intentionally, whereupon it is incumbent upon the defendant to show that his conduct was justified." *26ALR2d* 1263-1264.

Stewart therefore submits that he not only introduced proof that the acts were done maliciously *and* without justification, but that the defendant Strunk was unable to adequately bear the burden of persuasion of the existence of any justification.

Appellant appears to rely on *Brewster* v. *Miller*, Ky., 41 S.W. 301, 101 Ky. 368 in its argument claiming an absolute right to act as it did. *Brewster* is readily distinguishable from the instant case in that in *Brewster* no business had been transacted between the funeral directors and the claimant. Whereas, in the instant case a business relationship between Stewart and Mullican and Strunk had actually existed for three days prior to Strunk's refusal to load Stewart. Strunk had already chosen to do business with Stewart and Mullican and performance of the relationship had begun.

(iii) Evidence was presented that the money withheld from Stewart was wrongfully obtained.

Strunk alleges that it instructed Mr. Cooper of Somerset Stone Company to deduct certain monies owed to Strunk by Stewart from monies owed to Stewart by Somerset Stone Company, if agreeable to Stewart (Tr. p. 92, Q. 20). Strunk implies that Stewart agreed. Proof was introduced that Stewart didn't like having the funds withheld (Tr. p. 94, Q. 4) and proof was introduced through Stewart's testimony that the money was withheld without his permission (Tr. p. 53, Q. 210). So it all became a question of credibility of the witnesses and a question of whether the jury felt that the failure of Stewart to more vociferously object was "permission".

Stewart asserts that much more than a scintilla, much more than a fair or rational inference was presented to the jury. Actually, we assert that step-by-step proof on every claim and leaving the jury to decide whether there was a contract or business relationship; whether Strunk (and Hinkle) knew of that contract or relationship; whether Strunk intended to cause a breach thereof; whether the acts of Strunk were malicious or were without justification; and how much did James Lee Stewart lose as a result of the acts exposed to the jury. All of these were factual issues and conflicts of factual issues must be, as they were, properly submitted to the jury.

II. WAS IT ERROR FOR THE COURT BELOW TO INSTRUCT THE JURY ALLOWING RECOVERY BY THE APPELLEE, JAMES LEE STEWART, OF PUNITIVE DAMAGES?

Instruction No. 2 (R. p. 75) enabled the jury to return a verdict in favor of Stewart and against Strunk for punitive damages. Punitive damages are allowed in interference cases as is shown by the *Federal Digest* which interpreted *North Carolina Mutual Life Insurance Co.*, v. *Plymouth Mutual Life*, 266 F. Supp 231 to say, "Punitive damages may be recovered when malice and wanton conduct are alleged in a claim for tort of intentional interference with prospective business advantage," as is succinctly stated in *ALR2d Later Case Service* "Vol. 25-31" at page 264, "punitive damages are recoverable," referring specifically to the question of damages from interference with contract or business. Strunk objected to the giving of the instruction claiming that the facts established from the proof failed to support the giving of punitive damage instruction, alleging that the necessary elements were absent from the case, and in effect, stating that there was absolutely no evidence of willful conduct, or malicious conduct, or outrageous conduct.

Appellant correctly cited the basis on which punitive damages are recoverable from the case of *Ashland Dry Goods* v. *Wages*, Ky., 302 Ky. 577, 195 S.W.2d 312, 315 (1946) saying:

> "Punitive damages are damages other than compensatory or nominal damages awarded against a person to punish him for his outrageous conduct. The purpose of awarding punitive damages, sometimes called 'smart money' is to punish the person doing the wrongful act and to discourage such person and others from similar conduct in the future. Such damages are proper only when the wrongful act is wanton, malicious, or reckless. There must be a showing that the acts were either willful or malicious or that they were performed in such a way as would indicate a gross neglect or disregard for the rights of the person wronged."

The Court in the case of *Hensley* v. *Paul Miller Ford, Inc.*, Ky. 508 S.W. 2d 759, 762 (1974), reiterated the *Ashland Dry Goods* case, *supra*, and went on to decide the *Hensley* case in its light

> "that is whether, [the defendant's] acts were performed in such a way as to indicate a gross neglect or disregard of the rights of [the plaintiff]."

It should also be noted at this point that Instruction No. 2 in the instant case used much of the exact wording and terminology as did *Ashland Dry Goods, supra,* and *Hensley, supra,* (at 763).

It then appears that the Appellant is either arguing the facts of the case to this tribunal, which on an appeal of law is improper; or that Appellant is once again arguing that no more than a "scintilla" of the elements necessary existed and that no fair or rational inference could be drawn from Stewart's proof to support the action of the trial Court.

It would be repetitive to again argue in depth, that the elements did exist, inasmuch as those points were previously discussed under subsection "(ii)" of this argument. But, in answer to Appellant's argument, it is briefly pointed out that the very act of refusing to load the trucks, knowing of Stewart's contractual relationship with Mullican, was *willful;* that the *maliciousness* of the refusal to load after having already loaded Stewart for three days, knowing where Stewart's trucks were going (and why) is apparent actually and by implication; and that there could be no more *outrageous conduct* than forcing Stewart out of his negotiated contract only to take that contract on the same day and at a price higher than had been determined fair and reasonable through the process of bidding on a free and competitive basis. A contract right is a property right, and to destroy a man's property, or his contract, is to act wrongfully, (unless privileged to do so, and the burden of showing that privilege must be carried by the party alleging privilege or relying thereon). Strunk knew of Stewart's contract, business relationship, and Strunk knew of Stewart's contract, business relationship, and purchase order; Strunk knew of Stewart's ability to perform and actual commencement of performance; Strunk knew that Stewart's five trucks would not interfere with its quarry operation (Tr. p. 87, Q. 38); Strunk had never (or at least for three years and three months) refused to load anyone; and Strunk was able to, and did, provide the material which Mullican had already bargained for and already partially purchased. The facts are that Strunk had rock haulers that waited around the quarry to pick up jobs or to do Strunk's bidding which imparted upon Strunk a benefit; that Strunk (through Appleby) even asked Stewart to hire the Strunk haulers to work on Stewart's contract (Tr. p. 69, Q. 97); and that the Strunk haulers knew of Stewart's contract (Tr. p. 41, Q. 102, 108; p. 119, Q. 29); and that they wanted to work on that contract (Tr. p. 41, Q. 98); and we may infer from the proof that pressure was exerted on Strunk to get them Stewart's job. It follows that Strunk yielded to the pressure, and *disregarding* the contract *rights* of James Lee Stewart and Mullican, Strunk took Stewart's contract for itself and its haulers. Certainly, the proof was presented by Stewart to indicate, not just one element sufficient to award punitive damages, but several or all of the alternative elements required in this Commonwealth.

An issue, or issues, of fact existed. An instruction and submission of the issue, or issues, to the jury was proper.

III. DO THE PUNITIVE DAMAGES RENDERED BY THE JURY VERDICT APPEAR TO BE EXCESSIVE AND GRANTED UNDER THE INFLUENCE OF PASSION OR PREJUDICE?

From the outset, it should be noted that Instruction No. 2 allowed a maximum recovery of punitive damages in the amount of $33,800.00. The jury awarded only $13,500.00. Actual compensatory damages awarded to Stewart under Instruction No. 1 were $9,094.97 and under Instruction No. 3 were $909.85. (Mullican was awarded $3,036.39 under Instruction No. 4). Strunk had been paid $81,670.25 by Mullican and Strunk's haulers had been paid $18,218.34. (Stipulated)

The amount of punitive damages lies within the discretion of the jury as this Court stated in *Harrod* v. *Fraley*, Ky., 289 S.W. 2d 203 (1956) at page 205 that:

> "the jury may award punitive damages according to the conclusion they reach from the evidence concerning the conduct and motive of the person inflicting the injury."

In that case the Court approved a verdict of punitive damages which was more than four times the amount of actual damages (but reversed on other grounds).

In the case of *Hensley, supra,* the Court said, at page 763, that:

> "While there is a difference in the wording of our cases, we perceive the rule to be that an *award* of punitive damages need not bear a proportional relationship to the *award* of actual damages . . . (cases cited) . . . But punitive damages must bear some relationship to the injury and the cause thereof."

Then the Court went on to recognize in the next paragraph the

> "well established rule that the jury has a wide discretion in awarding punitive damages."

An obvious numerical relationship appears to exist between the amount of compensatory damages awarded to Stewart and Mullican for the interference with contract ($13,041.21) and the amount awarded as punitive damages ($13,500.00).

One of the purposes of assessing the punitive damages is "to deter future wrongdoing by the defendant and others by setting an example for the public in general." *Personal Injury* Vol. 3, § 2.02, P. 21, Matthew Bender, 1965; another is to "punish outrageous conduct" *Hensley, supra;* and another is to enhance the ordinary damages, *Harrod, supra*, at 205.

Apparently, in their deliberations, the jury considered the amount sought by Stewart as punitive damages and decided it was too high; considered the wrong done and felt it warranted punitive damages as a punishment of the wrongdoer; and considered $13,500.00 to be an appropriate amount to accomplish that end.

That is their prerogative, no inflammation or passion being evident. Under the circumstances of the instant case, it should not be disturbed.

CONCLUSION

It is respectfully submitted that the judgment of the Lower Court refusing to enter a Directed Verdict and refusing to grant the Motion of Strunk for a Judgment Notwithstanding the Verdict or in the alternative to grant a new trial was correct and that the Judgment against Strunk Construction Company should be affirmed.

Respectfully submitted,

JOHN G. PRATHER. JR.
JOHN G. PRATHER
P. O. Box 106
Somerset, Kentucky 42501

Attorneys for Appellee
James Lee Stewart